

**CITY OF SHORELINE  
HEARING EXAMINER**

**FINDINGS, CONCLUSIONS AND DECISION**

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**APPELLANT:** Timothy and Patty Crawford

**APPLICANT:** Aegis Assisted Living

**FILE NUMBER:** 2000-0821

**APPEALS:** Timothy and Patricia Crawford are appealing the decision of the City of Shoreline's Director of Planning and Development Services in granting the zoning variance to reduce the sensitive area buffer width and the SEPA threshold determination not to require an Environmental Impact Statement.

**REVIEW PROCESS:** The Hearing Examiner holds an open record hearing on the appeal of the preliminary approval of the zoning code variance and SEPA Threshold determination for the Aegis Assisted Living project. Presentation of testimony and argument is limited to the applicant, appellant and City staff as parties to the appeal. The Hearing Examiner makes a decision regarding the SEPA threshold determination and the zoning code variance.

**I. BACKGROUND SUMMARY:**

**A. Location and Neighborhood:** The subject property is located at 14900 1st Avenue NE (South Building) and 15100 1st Avenue NE (North Building). The subject property is located in the Parkwood Neighborhood and is adjacent to Interstate-5. Three churches lie directly south of the site with a single family neighborhood south of the church properties. Two sports fields are located within the boundaries of Twin Ponds Park located across 1st Avenue. Single family homes are located south of the park.

**B. Project Site:** The subject property is divided into two separate parcels being considered jointly by the City of Shoreline. The property is triangular in shape and contains 4.35 acres in area. The existing single story buildings and impervious parking areas are slated for demolition. The North Branch of Thornton Creek runs through the site in Peverly Pond. The associated wetland and stream are classified as "Class 2". A number of habitat problems have been identified both on-site and immediately adjacent to the site.

**C. The Proposal:** The south portion of the site will contain a 3-story assisted care facility of 100,419 square feet for the elderly with 102 units. The north portion of the site will contain a 2-story facility of 38,136 square feet with 54 living units for specialized dementia care programs.

Staff will be available on a 24-hour basis, seven days a week and will number between 6 and 40. Site improvements will include new parking, perimeter and interior landscaping and a new stormwater drainage system. Curb, gutter and sidewalk improvements are proposed for 1st Avenue NE. In addition, sensitive area enhancements will be made.

**D. Comprehensive Plan Designation:** The land use designation for the subject property is Medium Density Residential. The comprehensive plan identifies the need for housing for senior and disabled residents.

**E. Zoning Designation:** The subject property is zoned R-24 (Residential - 24 units per acre). Senior assisted housing is an outright permitted use in the R-24 Zone (SMC 18.08.030).

**F. State Environmental Policy Act (SEPA):** A Mitigated Determination of NonSignificance (MDNS) (Attachment A to Exhibit was issued June 27,2000 containing 14 mitigation measures and conditions.

**G. Procedural History:** The application for these properties has been processed in the following sequence:

- Building Permit Application - 1999-2242 South Parcel	December 13, 1999
- Building Permit Application - 2000-0021 North Parcel	January 6, 2000
- Environmental Checklist submitted	January 6, 2000
- Site Development Permit Application - 2000-0216	February 4, 2000
- Letter of Complete Application - 2 Building Permits	February 7, 2000
- Letter of Complete Application - Site Development Permit	March 3, 2000
- Zoning Variance Application	May 19, 2000
- Determination of Completeness	May 23, 2000
- Notice of Application / Publication Date	May 31, 2000
- End of Public Comment Period	June 15, 2000
- SEPA Determination (MDNS) / Zoning Code Variance Decision	June 27, 2000
- Appeal Filed by Crawfords	July 12, 2000
- Open Record Public Hearing - Hearing Examiner	September 27, 2000

**H. Issues of the Appeal:** The specific issues identified by the Appellants in their initial appeal dated July 12, 2000 (Exhibit A), the memorandum filed September 20th (Exhibit E), 2000 and in oral testimony provided at the public hearing have been identified as follows (Note: The number and order of issues are not the same as discussed in the documents provided to the Hearing Examiner because of inconsistencies between those documents and for purposes of analysis and decision):

1. An issue of standing and completeness of application exists because of the uncertain nature of who is the present owner of the property or that the applicant complied with SMC 16.40.030 (A) requiring proof that the application is submitted "with the consent of all owners of the property".

2. The law applicable to the case would be the law in effect on the date of complete application - May 23, 2000.

3. The presence of a Class 2 stream or Class 2 wetland on the subject property creates of the property a sensitive area tract to which relevant Code provisions must be applied. It is also contended that the wetlands are under-classified.

4. The City made an erroneous SEPA threshold determination in that it was determined that there was no need for an environmental impact statement with regard to the Class 2 stream and Class 2 wetlands located at the site of the project.

5. The mandatory criteria for approval of the subject variance are not met. Specific references are made to criterion 1, 2, 3, 4, 5, 6, 7, 8 (Note: Criterion 8 was listed in the initial appeal document; however no specific reference was contained in the brief submitted to the Hearing Examiner), 11 and 13. Also, it was noted that the variance does not describe with sufficient detail the degree and actual measurement of the variance from the buffers, the wetlands and the stream.

## **II. PUBLIC HEARING:**

On September 27, 2000, the Hearing Examiner held a public hearing on the appeals. The hearing was opened at 7:05 p.m. in the Mount Rainier Room of the Shoreline Conference Center and was closed at 11:55 p.m.

At the beginning of the public hearing the Hearing Examiner indicated that he had visited the site and the surrounding neighborhood and had reviewed the written record including the staff report with attachments as well as the appellant's brief. He noted that only parties of record would be allowed to participate in the hearing and that the burden of proof is that of the appellant. Each witness was asked to affirm that the information they would provide was true.

Testimony was first taken from the City of Shoreline; then the applicant and then the appellant. Opportunities were provided for questions and cross-examination. Each party was provided an opportunity for a closing statement.

Those who testified were as follows:

### **City of Shoreline:**

Ian R. Sievers, City Attorney  
Paul MacCready, Planner II

### **Applicant:**

Terry Danysh, Attorney for Aegis  
Steve McCullagh, Aegis  
John Laufenberg, Wetland Resources, Inc.  
Derek Marks, Wetland Resources, Inc.  
W. Glen Coad, P.E.  
Peter A. Wurtz, Landscape Architect

Appellant:

Charles Hamilton III, Attorney  
Douglas Hennick, Department of Fish & Wildlife  
George Croft, Neighbor and Fisherman  
Janet Way, Thornton Creek Legal Defense Fund  
Timothy Crawford, Appellant  
Patricia Crawford, Appellant  
Richard Tinsley, Forestry/Plant Steward

Testimony of the City summarized the proposal and the City's analysis of the key issues of the appeal contained in Hearing Examiner Exhibit D.

The applicant entered a number of expert witnesses dealing with the designation of the wetlands and stream, impact of reduction of the buffers, proposed landscaping to enhance the buffers and surface water management to protect the wetlands and stream.

The appellant introduced expert witnesses and citizen testimony on the impacts of wider buffers versus an enhanced smaller buffer, the presence of salmonids in the stream, quality of the buffer vegetation and impact on the stream, wildlife, inadequacy of mitigation relative to the environmental impact, and accumulation of garbage on the site. The applicant objected to two background papers that were submitted as not being directly relevant to this site. The Hearing Examiner upheld that objection, but at the request of the appellant allowed them to remain as part of the case file.

### III: DISCUSSION OF ISSUES, FINDINGS AND CONCLUSIONS:

The five issues identified in the appeal are discussed in the following. The Hearing Examiner Findings and Conclusion related to each issue are included following the discussion for sake of clarity.

**1. An issue of standing and completeness of application exists because of the uncertain nature of who is the present owner of the property or that the applicant complied with SMC 16.40.030 (A) requiring proof that the application is submitted "with the consent of all owners of the property".**

The appellant contends that the application could not be considered complete unless it was submitted by the "owner" (SMC 18.40.020); however, in their initial appeal they cited 16.40.030 (A) that states that the application must show that it is submitted "with the consent of all owners of the property". Chapter 16, Division II, deals with Land Use and Development Permit Processing and Chapter 18 deals with Application Requirements / Notice Methods.

The City indicates that the standard procedure for any land use application requires an affidavit signed by the property owner or their authorized agent. These are included in Exhibit E within Hearing Examiner Exhibit D. A letter from Provail (Hearing Examiner Exhibit C), formerly

known as United Cerebral Palsy Association, who were the owners of the property at the time of the building and site development permit applications and the variance request confirmed that Aegis Assisted Living had their consent and support since September 23, 1998. It was testified at the Public Hearing that Aegis Assisted Living now owns the property, having closed the transaction with the last month or so.

**Findings:**

1a. The applicant submitted application forms consistent with the standard procedures of the City of Shoreline which fully disclosed them as the applicant, United Cerebral Palsy Association as the owner of the property and Oakmont Construction Inc. as the contractor.

**Conclusions:**

1a. Although there may be some confusion between the two portions of the Shoreline Municipal Code cited by the Appellant, the applicant has conformed to the standard procedure of the City for Land Use and Development Permits.

1b. The issue of ownership as stated by the appellant is not an issue for consideration by the City in determining the completeness of an application since the applicant met the City's standard requirements that are consistent with the Shoreline Municipal Code.

**2. The law applicable to the case would be the law in effect on the date of complete application May 23, 2000.**

The applicant submitted building permit applications on December 13, 1999 for the south parcel and on January 6, 2000 for the north parcel. At the City's request, a site development permit encompassing both parcels was submitted February 4, 2000. On February 7, 2000 the City informed the applicant's agent that the two building permit applications were complete. On March 6, 2000 they informed the applicant's agent that the site development permit associated with the two building permits was also complete. Both notices indicated that new information might be required as the review continued.

During the course of the review the report entitled *Critical Area Study and Wetland Mitigation Plan for Aegis Assisted Living* done by Wetland Resources, Inc. in February 1999 was revised on April 24, 2000. It was determined that the project either would need to be revised to meet the 100 foot buffer requirements from a Class 2 Stream with salmonids or a variance would be required to allow the buildings to be built as proposed. The appellant argues that the requirement for a variance is an indication that the application is not complete; therefore, it should be processed under the provisions of the newly adopted regulations. In addition, the fact that since the Critical Area Study was revised, that the entire application would not be considered as complete. The City argues that a variance is not a permit, and the variance did not change the scope of the project as previously found as complete. They also argue that the project "vested" with the complete building permit applications.

The appellant argued in the oral testimony that they could not find Appendix A referred to in the code that is the checklist used by the City to determine the completeness of various permit applications. It was noted by the City that these are attached to each permit form. The appellant

asked that the public hearing be held open until that form could be provided to them. The City and applicant objected. The Hearing Examiner denied the request to hold the record open for the form since it served no material purpose for this hearing since the City had issued letters indicating the applications were complete and it appeared that any review by the appellant should have been done in preparation for the hearing in order to support the appeal.

**Findings:**

2a. The City issued letters of completeness on the building permit applications and site development permit application prior to the change in applicable City regulations.

2.b The fact that revisions are made to background reports or information provided with a permit application does not cause them to be considered not complete.

**Conclusions:**

2a. The applicant was vested under the regulations applicable at the time the City issued the Letters of Completeness on the building and site development permits.

2b. The submission of a variance application does not change the scope of the project and does not change the date at which the original applications vested.

**3. The presence of a Class 2 stream or Class 2 wetland on the subject property creates of the property a sensitive area tract to which relevant Code provisions must be applied. It is also contended that the wetlands are under-classified.**

The appellant submitted a number of exhibits to confirm the fact that salmonids are present in the stream requiring it to be considered at a Class 2 Stream. Neither the Applicant or the City contested this. No evidence was submitted by the Appellant to support that the stream should be classified higher than a Class 2 stream. In addition, the appellant had an expert testify and under cross-examination noted that the enhanced reduced buffer would be better than the existing situation; however, he felt that the wider buffers would have better long-term results.

The *Critical Area Study and Wetland Mitigation Plan for Aegis Assisted Living* by Wetland Resources, Inc. and testimony by experts who worked on the report evaluated the impacts of reducing the buffers as provided in the Shoreline Municipal Code, construction notes, the enhancements proposed as mitigation and a project monitoring program. No specific report countering the recommendations of this report were provided by the appellant.

The appellant argues that the owner of any property containing sensitive areas or buffers is required to file a notice with King County Records and Elections Division before the City of Shoreline can approve any development proposal for the property. They note that this has not been done; however, Condition 10 imposed by the City requires that such a notice be filed. No time period for that filing is specified.

**Findings:**

3a. The wetlands and stream on-site and adjacent to the site are classified as Class 2 Wetlands and a Class 2 Stream.

3b. The City of Shoreline has allowed the reduction of required buffers based on a provisions within the Shoreline Municipal Code however, the required mitigation will enhance and increase the amount of wetland buffer, enhance the existing stream buffer, provide for future removal of barriers off-site, and provide improved water quality and landscape management practices.

3c. A special study of the sensitive areas was prepared and considered by the City of Shoreline in its decision.

**Conclusions:**

3a. The designation of the wetlands and stream as Class 2 is consistent with the provisions of the City of Shoreline.

3b. The reductions of the buffer width as proposed are consistent with the provisions of the Shoreline Municipal Code.

3c. The conditions proposed as mitigation will provide an overall improvement for the existing sensitive areas located on and adjacent to the site.

**4. The City made an erroneous SEPA threshold determination in that it was determined that there was no need for an environmental impact statement with regard to the Class 2 stream and Class 2 wetlands located at the site of the project.**

Under the discussion of the issue on meeting the variance criterion in the September 20th, 2000 Memorandum of the Appellant there is discussion of the fact that the SEPA threshold mitigated declaration of non-significance (MDNS) is erroneous. The arguments that follow indicate that the MDNS was issued based on the "promise of future mitigation", brings up the lack of recording a notice of sensitive areas on the site, and implies that the requirement that all mitigation be done within 24 months of June 27, 2000 will allow environmental damage to occur. In reviewing the information provided, there are not specific references to where the City specifically erred in making their SEPA determination.

The conditions applied by the City of Shoreline as mitigation appear to be designed to improve the existing environmental situation and the construction of the two new buildings and parking lots do not create damage to environmental areas where there is not already a building or impervious surface. The City notes that based on the required mitigation that water quality and run-off will be improved, the wetland buffer area will be increased and enhanced, the stream buffer will be enhanced, and landscape management practices will be controlled.

**Findings:**

4a. A threshold determination under Ch. 43.21C RCW (SEPA) whether to require preparation of an Environmental Impact Statement "shall be accorded substantial weight".

4b. The City of Shoreline issued a Mitigated Declaration of Non-Significance.

**Conclusions:**

4a. The Appellant did not provide significant evidence to show that the City erred in its determination not to require an Environmental Impact Statement.

4b. The conditions required as environmental mitigation will result in an overall improvement for the existing sensitive areas located on and adjacent to the site and will reduce the project's environmental impacts below the thresholds of both "probably" and "significant".

**5. The mandatory criteria for approval of the subject variance are not met. Specific references are made to criterion 1, 2, 3, 4, 5, 6, 7, 8 (Note: Criterion 8 was listed in the initial appeal document; however no direct reference was contained in the brief submitted to the Hearing Examiner), 11 and 13. Also, it was noted that the variance does not describe with sufficient detail the degree and actual measurement of the variance from the buffers, the wetlands and the stream.**

The appellant's appeal memorandum, the City's response memorandum, the City's Zoning Code Variance report and decision, and the applicant's initial variance application all respond to the 13-decision criterion. The following discussion focuses on the issues raised by the appellant since they have the burden of proof that the City erred in its decision to approve the variance.

Criterion 1 regarding unnecessary hardship: The appellant again argues the issue of ownership that has been previously dealt with in the discussion on Issue 1. They also argue that the City did not apply the criterion properly and that it is based on speculation. The City notes that the discovery of salmonids in the concrete lined drainage ditch that required the 100 foot buffer for a Class 2 stream under the regulations would require a redesign of the project and reduce the buildable area to the degree that the project would not be feasible. The applicant discussed this in their variance application and introduced additional testimony and drawings (Exhibits N, O, P) at the public hearing that illustrated the significant impact. The City also notes that the proposed mitigation actually enhances a degraded stream and wetland.

Criterion 2 related to unique characteristics of the site: The appellant states that it is unclear as to what material was submitted for the city to make the determination on the financial feasibility and necessity for the variance. The City identifies the triangular shape of the lot, the location of the drainage ditch/stream in the I-5 right-of-way, the location of the wetlands in the center of the site as factors reducing significantly the area in which construction could take place if the full buffer width was applied.

Criterion 3 related to the property being deprived of rights and privileges of similar properties: The appellant states that the fact other properties in the vicinity also extend into the required stream buffer "does not appear to be justification" for the City to allow a variance. They argue that this property has not had the historical property rights and privileges as do the adjoining properties, but in fact, the buildings and parking on the subject property currently extend into the buffer.

Criterion 4 related to the variance not being the result of action by the applicant or property owner: In addition to the argument made in the appellant's September 20th Memorandum, testimony and photographs (Exhibit U) were presented at the hearing as to the presence of garbage being a deliberate action by the applicant to create a situation where any



enhancement would be an improvement. No evidence that this was a deliberate action was presented. The applicant, now owner, stated that the property would be cleaned up. The City simply stated that the need for the variance was not due to an action by the applicant or property owner; no construction, demolition or other land use activity has taken place on the site.

Criterion 5 related to the variance does not create health and safety hazards: The appellant simply raises a question regarding the safety of elderly patients related to the stream and wetlands and presents testimony that the health of the salmonids would be affected. It was also noted in cross-examination of the appellant's expert witness that the proposed improvements in the reduced buffer would be an improvement over the existing conditions.

Criterion 6 related to not relieving an applicant from any of the procedural provisions of this title: The appellant states that the variance does not appear to relieve the applicant from procedural provisions relating to streams; however they again argue the issue of the filed notice of sensitive areas. The City states that they must meet all procedural provisions and have made the filing of the notice a condition to the variance approval.

Criterion 7 related to relieving the applicant from any standard or provision: The appellant argues that if the City erred in not requiring that an Environmental Impact Statement be done, then the applicant has been relieved of that procedural burden. This issue was dealt with in the previous discussion of Issue 4. The City notes that buffer widths may be reduced through the variance process.

Criterion 8 related to relief from previous conditions: This was included in initial appeal statement, but no direct arguments were made. The City states that the applicant is not relieved of any prior conditions by this variance since none have been previously applied.

Criterion 11 related to the variance being the minimum necessary to grant relief: The appellant makes a statement that the variance sought is not the minimum necessary and offers the opinion that the applicant could stay within the footprint of the existing structure without unnecessary detriment to its plans. No specific evidence was presented. The City has applied conditions that will reduce the extent of encroachment in the buffer.

Criterion 13 related to relieving the applicant from provisions of the Sensitive Areas except for buffer width: This item is confused because of the reference to SMC 18.24.340 in the Zoning Code Variance report. This section refers to Wetlands Mitigation and should have been SMC 18.24.360 related to Stream Buffers as noted in Hearing Examiner Exhibit D. The discussion in the top paragraph of page 4 clarifies the error that occurred in the codification of Title 18. The appellant argued that this City ignored section SMC 18.24.360.C and its provisions for buffer averaging; however, the variance criterion specifically states that the buffer width may be modified. Therefore, this argument is not relevant.

In so far as the issue of not adequately describing the extent of intrusion into the required buffers, the applicant has submitted scaled drawings and the City has identified specific revisions by number for changes as part of the conditions.

**Findings:**

5a. The City has reviewed and responded to each of the criterion for the granting of a variance.

5b The City has the authority to grant variances from the required buffer widths for wetlands and streams.

**Conclusions:**

5a. The zoning variance criteria specified in SMC 18.44.30 (as corrected) have been met.

**VI: DECISIONS:**

1. Based on the foregoing findings and conclusions the appeal of the City of Shoreline's decision to grant Aegis Assisted Living a zoning variance to alter the 100-foot buffer width requirement for a Class 2 Stream and to alter the 50 foot buffer width requirement for Class 2 Wetlands to the buffers shown on Exhibit B in Hearing Examiner Exhibit D is denied.

2. Based on the foregoing findings and conclusions the appeal of the City of Shoreline's decision to issue a Mitigated Determination of Non-Significance (MDNS) for Aegis Assisted Living is denied.

3. It is further recommended that the City of Shoreline modify the Conditions as follows:

Condition 6: In addition to the requirements to decrease impervious surface areas and/or move further away from the sensitive areas that were included consider the following:

- Relocate sidewalk connecting from the South building to the street adjacent to the parking to the south side of the driveway. If the wood bridge were removed, then the connection to the sidewalk would not be required.

- Add area north of the driveway/parking on either side of the walkway to the wood bridge as additional buffer.

Condition 10: Add a requirement that the notice of sensitive areas on the property titles shall be filed prior to issuance of a building permit.

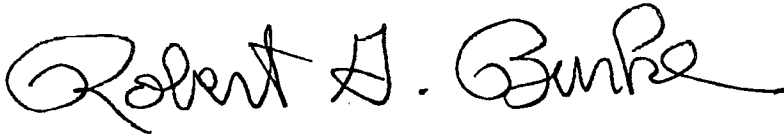
**EXHIBITS:**

See attached list of Exhibits prepared by the City Clerk's office.

**PARTIES OF RECORD:**

See attached list entitled Parties of Record List compiled by the City Clerk's office.

Entered this 12th Day of October, 2000.

A handwritten signature in black ink, reading "Robert G. Burke". The signature is fluid and cursive, with the first name "Robert" and last name "Burke" clearly legible, and a middle initial "G." in between.

Robert G. Burke, Hearing Examiner

**APPEAL:**

An appeal of the Hearing Examiner's decision is governed by RCW 43.21C.075, the appeal section of SEPA statutes. Under this provision an appeal of the environmental determination must be combined with an appeal of the underlying governmental action.